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In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL STOUT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a criminal conviction entered on July 3, 1979.

OPINION BELOW

The Opinion of the Court of Appeals is set out in the Appendix, as it has not been formally published. A copy of the order of August 10, 1979 denying a Rehearing is also set out in the Appendix. A-9.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1979. A timely Petition for Rehearing *En Banc* was filed by Petitioner on July 17, 1979 and was denied by the Court of Appeals on August 10, 1979. On August 15, 1979, the Court of Appeals stayed its Mandate until September 10, 1979, pending application for certiorari to this Court. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1); 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether Stout's Fifth Amendment Right to be free from providing self incriminating statements was violated when the government, in a criminal failure to file case, introduced into evidence, in its case in chief, his 1040 Federal Income Tax Forms, on each of which a Fifth Amendment Right was asserted in accordance with this Court's *Garner* and *Sullivan* decisions.

2. Whether this prosecution was so affilicted with Fifth Amendment Procedural Due Process violations that it offended fair play principles established in this Court's *Kotteakos* and *Chapman* decisions.

3. Whether this prosecution violated Fifth Amendment Equal Protection concepts in that Stout was invidiously selected for prosecution because of his exercise of political and other First Amendment rights, in violation of principles established in this Court's *Yick Wo* decision.

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person . . . shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property without due process of law; . . .

STATEMENT

Paul Stout, a 61 year old "vocal" (First Amendment) tax protester, was convicted of "failing to supply information to the government relative to his federal income tax."[1]

Paul Stout was a Libertarian Party candidate for Congress in 1972 and he was under continual surveillance by the IRS and other "intelligence" agencies since then. Some of the material contained in Mr. Stout's various IRS files was revealed after indictment but prior to trial; some was disclosed, in violation of Rule 16 of the Federal Rules of Criminal Procedure, during the middle of the defense case, and, mysteriously, some *in camera* material was filed with the District Court Clerk's Office by the trial court *after* oral argument in the Court of Appeals.[2] The opinion of the Court of Appeals refers to a letter allegedly sent by Stout to the President that never surfaced during the trial.

During the investigation, IRS administrative summonses were utilized co-equally with the Subpoenae of a *Special*

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[1] Incredibly (as we have never known this to be a crime, at least not one for which Stout was indicted or tried) this is the exact language utilized by Judge Sprecher in the introduction of his opinion. See Appendix A-1.

[2] See minute order set out in the Appendix A-11, which was sent directly to Stout and not to his counsel. This *in camera* material was never made part of the Record on Appeal in the Court of Appeals.

Grand Jury investigating "tax protesters." Stout was a "target" of this Special Grand Jury at the time the summonses were used. The trial Court later allowed the entire unedited indictment of the *Special* Grand Jury to go to the petit jury along with the instructions and other evidence in the case.

Prior to the trial, Stout moved to dismiss the Indictment on grounds that the IRS had selectively focused on him and other "vocals" to the exclusion of all other non-filers. At first, the trial Court was going to allow a hearing on this, but later changed its mind and eventually denied the Motion, citing an earlier "ruling", which it had never made.

At the trial, there were numerous improprieties which adversely affected the jury, such as the prosecutor's handing up of verdict forms to the trial Judge in front of the jury. Also, Mr. Stout's 1040 returns, which asserted a Fifth Amendment Right against self incrimination were introduced over objection *by the government,* as part of its *case in chief.*

REASONS FOR GRANTING THE WRIT

I.

THE 1040 RETURNS, WHICH ASSERTED THE FIFTH AMENDMENT, INTRODUCED DURING THE GOVERNMENT'S CASE FOR FAILURE TO FILE A RETURN, VIOLATED PETITIONER'S RIGHT TO BE FREE FROM BEING COMPELLED TO TESTIFY AGAINST HIMSELF.

"This case involves a (tax) criminal prosecution in which the government introduced Petitioner's income tax returns (sic) to prove the offense against him. The question is whether the introduction of this evidence, over Petitioner's Fifth Amendment objection, violated the privilege (sic) against compulsory self incrimination when Petitioner (claimed the right and the evidence was nonetheless admitted over his objection)." Mr. Justice Powell in *Garner* v. *U.S.,* 424 U.S. 648, 649 (1976). We urge this Court to accept this case and answer the *Garner* question in the affirmative. In good faith, Stout complied with the mandate of the decision.

The government has consistently taken the position that what Stout filed were not returns; they were what "they" call "blank" "returns." Considering this, we submit that it was incumbent upon the prosecutor in a "failure to file" case *not* to introduce into evidence any returns which didn't meet IRS specifications. We would agree that the Fifth Amendment Right would be waived if Stout had introduced such a return in his own behalf.

Otherwise, no returns for the years under indictment were properly before the jury.[3]

The "crime" of failure to file is complete as of April 15th of every year, except for statutory extensions,[4] and that everybody is compelled to file a return. As stated by Justice Powell:

> ". . . it cannot fairly be said that taxpayers are 'volunteers' when they file their tax returns. The government compels the filing of a return. . ." *Garner* v. *U.S.*, 424 U.S. 648, 652 (1976)

As stated in *U.S.* v. *Sullivan,* 274 U.S. 259 (1927):

> "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account, refuse to make any return at all." *Id.* at 263.

Judge Sprecher, when he stated that Stout was convicted for "failing to supply information" couldn't have been more correct, although there is no crime which fits this description. What Judge Sprecher failed to state, among other things, is that Stout was convicted of "failing to supply information" *after* he properly "took the Fifth" by the introduction into evidence of the very documents on which he made his good faith assertion of Constitutional protection.[5]

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[3] The introduction of the returns confused the jury because they couldn't decide whether this was a failure to file case or a late file case. This confusion was carried over to the oral argument in the Court of Appeals, a transcript of which is fully set out in the Appendix, A-12.

[4] The prosecutor admitted at the trial that subsequent events were not relevant to a completed offense.

[5] The trial Court admitted that Stout had acted in good faith. Tr. 70. References to "Tr." and "R" refer to the Trial Transcript and Record in the Court of Appeals, respectively.

As we advised the Court of Appeals, this IRS practice of criminally prosecuting "late filers", even when in good faith, they "take the Fifth" as to details, must necessarily result in an increased number of non-filers. For example, with the economic situation being what it is many people don't file because they don't have the money to pay at that time. These individuals would eventually file returns and pay their tax later when they could afford it. However, if they learn that they could be in the same trouble (i.e., facing a criminal indictment) whether they file or not, irrespective of a Fifth Amendment, they will necessarily opt for staying away from the "system" entirely. They will not file returns, *ever,* or until they are caught.

We believe that this is a matter of Executive policy with which this Court should show some concern. This Court recently "struck a blow" for freedom when it chided the IRS over the retroactivity issue.[6]

II.

MISCONDUCT AT THE TRIAL AND BY THE IRS DURING THE INVESTIGATION CONSTITUTE, UNDER THE TOTALITY OF THE CIRCUMSTANCES, A VIOLATION OF STOUT'S PROCEDURAL DUE PROCESS RIGHTS.

A. The Array Of Charges And The Conduct Of The Trial Assured That Stout Would Be Convicted.

Stout was denied a continuance of the trial, although he *and* his appointed counsel stated on the day of the trial

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[6] See, *Central Illinois Public Service Company* v. *U.S.*, ... U.S. ..... (February 28, 1978). We submit that there are far too few decisions favorable to Taxpayers. Moreover, as we have observed, the allotted 5 or 6 Tax cases every Term almost always are appeals by the government. It might be wise for the Court to hear the plea of a Taxpayer rather than the Solicitor General. See, *Farretta* v. *Califor-*

(footnote continued)

that they had an "irreconcilable" difference in trial strategy. This difference resulted in there being no consistent defense theory.[7]

Moreover, we submit that it was incumbent upon the trial Court to know "both sides" of the case. Here the trial Court seemed to know only the prosecutor's case, even though he had previously tried a "tax protester case." Moreover, the trial Judge had a great deal of pre-trial contact with Mr. Stout in which there had been arguments on a multitude of legal issues.

We believe the trial court expressed its "misunderstandings" about the defense on a number of occasions in front of, as well as outside the presence of, the jury. (Tr. 13, 65, 66, 68 and 211). The trial Court in at least one instance acted as a government advocate in arguing law, *sua sponte*. (See, Tr. at 285, *et seq*).

There was no exclusion of witnesses and two IRS agents, who would later testify, were permitted to attend the entire trial. Whether other potential IRS witnesses or agents were present can only be conjectured. However, the effect of this must have been devastating. (See, e.g., Tr. 274).

As stated by the dissent in a "tax protester" case, *U.S.* v. *Scott*, in the 9th Circuit, 521 F.2d 1188 at 1198:

> Whatever one may think of appellant's defense on the merits, he was and is entitled to a trial that com-

(footnote continued)
nia, 422 U.S. 806, 826 (1975). Favorable Court decisions might possibly assuage some of the harm which has been caused by the rampaging IRS bull. It *might* not be too late. See, also, Judge Markey's dissent in *Dema* v. *U.S.*, 544 F.2d 1373 (7th Cir. 1976), *cert. denied*, 429 U.S. 1093.

[7] Stout originally desired to have a lay advocate to assist in a *pro se* defense but the trial Court denied him that Sixth Amendment Right.

> ports with due process. The meticulous fairness of the trial judge is evident from the record, but as the majority so forcefully states, deliberate intrusions by the prosecution upon a pro se defendant's private councils "offend one's sense of fair play and subvert the proper administration of justice."

Moreover, Stout was constantly maneuvered and intimidated into providing his "defense" *in advance* of his case in chief. (Tr. 55, 73-74 and Vol. II R. 2). This was a case in which the government was allowed discovery of the Petitioner's case in advance of trial.

B. Stout's Motion To Suppress Should Have Been Granted Because Of The Improper Usage Of IRS Administrative Summonses During A Special Grand Jury Investigation Which Was Targeting On Area Tax Protesters.

Evidence was admitted because of the denial of Stout's Motion to Suppress, which was obtained by the IRS through the improper use of IRS summonses. This usage of administrative summonses, because the IRS by-passes the judicially supervised grand jury and prosecutorial process, should be condemned. See, e.g., *Powell* v. *U.S.*, 379 U.S. 48 (1964).

Further, the specter of the use of illegally obtained wiretap evidence still beclouds this case. The government never filed the affidavits they had promised to file stating that there had been no wiretapping. (Vol. 1, R. 26).

C. This Was A Classic In Prosecutorial Overkill And Stout's Mistrial Motion Should Have Been Granted.

Stout was convicted by the jury of being a "bad" man, i.e., one who reads "Playgirl", "Penthouse", and "Oui" magazines; one who contributes to defense funds of other tax protesters; according to an instruction which was

given—one who has "a vital outcome" in his case; a false "Reverend"; and the creator of his own religion. (Tr. 383-395).

The cumulative effect of all this was devastating to a good faith defense and the error is "plain." "Heroin pushers" have been better treated than Mr. Stout. See, e.g., *U.S.* v. *Marrero,* 486 F.2d 622 (7th Cir. 1973).

Moreover, the effect of the prosecutor's turnover of Rule 16[8] material in the middle of the trial (Tr. 290-291) is impossible to evaluate. This should have resulted in an immediate mistrial or, because of the nature of the material delivered, a midtrial hearing should have been held as to the selective nature of the prosecution. (See our Argument Heading III, *infra*).

In his argument, the prosecutor inflamed the jury into believing that the entire "voluntary" tax system would collapse if Stout were not found guilty. We submit, as a misstatement of law alone, that required reversal.[9] *U. S.* v. *Bohle,* 445 F.2d 54 (7th Cir., 1971) and *U. S.* v. *Phillips,* 527 F.2d 1021 (7th Cir., 1975).

D. It Was Improper For The Court To Have Allowed Evidence Of Prior And Subsequent Filing Conduct.

This was not a case like *U.S.* v. *Ming,* 466 F.2d 1000 (7th Cir., 1974), utilized by the prosecutor at the trial. In *Ming,* the objected-to conduct included *completed* offenses of non-filing.[10] This was not the case here. We were not dealing with "like nature" conduct. More-

[8] Federal Rules of Criminal Procedure.

[9] ". . . it cannot fairly be said that taxpayers are 'volunteers' when they file their tax returns." *Garner* v. *U.S.,* 424 U.S. 648, 652 (1976) See, also, *U.S.* v. *Sullivan,* 274 U.S. 259 (1927).

[10] See Appendix A-27 for a chart of Stout's tax "return" filing history.

over, the subsequent filing (1977) was elicited by the prosecutor only for the impact upon the jury of Stout's signature as a "Reverend." Post indictment acts are not relevant in a failure to file case but they were utilized in this trial.[11] *U.S.* v. *Borkenhagen,* 468 F.2d 435 (7th Cir., 1972).

Introduction of "other conduct" evidence depends heavily upon the facts of each case and should have been weighed (under Rule 404(b) of the Federal Rules of Evidence) against possible prejudicial impact. See, Vol. 2, No. 5 Federal Rules of Evidence News, May, 1977, pp. 77-34. According to the Advisory Committee's Note, "undue prejudice within Rule 403 is the tendency to lead the jury to make its decision on an improper ground, frequently an emotional one." Doubts should have been weighed in favor of a determination of prejudice. *U.S.* v. *Robinson,* 544 F.2d 611, 616 N. 6 (2d Cir. 1976).

We submit that Stout was convicted by a jury influenced by matters outside of the indictment, including his tax return filing conduct; his non-payment of taxes[12] his reading material and *hetero*sexual proclivities; his religion; his politics; and the fact that the "voluntary" tax system would collapse without his conviction.

E. It Was Error To Single Out The Credibility Of Stout's Testimony And In Providing The Jury With Copies Of The Special Grand Jury Indictment.

The trial Court instructed the jury, over Petitioner's objection, (Tr. 489, *et seq.*) that:

[11] The prosecutor had admitted at the beginning of the trial that subsequent events could not possibly be relevant to a completed offense. (Tr. 75).

[12] The prosecutor did state that non-payment was not an issue here because that was a civil matter. In so doing, he raised the specter of a possible failure by Stout to pay his "fair share."

> A defendant who wishes to testify is a competent witness, and his testimony should not be disbelieved merely because he is the defendant. *However, in weighing his testimony, the jury should consider the fact that the defendant has a vital interest in the outcome of this trial.* Vol. II, R. 19; Government Instruction No. 8; La Buy 6.09; 33 F.R.D. 581. (Emphasis added).

This instruction was erroneous in that Petitioner's testimony was *singled* out by the trial Court as explicitly suspicious. Good faith and good motive was the defense here and for that reason this instruction was even more devastating than it might be in other types of cases.

The Eighth Circuit has *uniformly* held that an instruction which singles out the Defendant's possible interest in the case should not be given. See, e.g., *U.S.* v. *Bear Killer,* 534 F.2d 1253, 1260 (8th Cir., 1977).[13]

The case against Mr. Stout was not a "run of the mill" case. Rather, the Petitioner was being prosecuted "to set an example." We submit that the government and its witnesses had as "vital an interest" in the outcome of this case as Mr. Stout. To single out the Petitioner's testimony as being suspect—*especially* where the defense related to good faith beliefs—was to poison the minds of the jurors against Mr. Stout.[14]

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[13] *Accord: United States* v. *Brown,* 453 F.2d 101, 107 (8th Cir.), *cert. denied,* 405 U.S. 978 (1972); *United States* v. *Long,* 449 F.2d 288, 298-299 (8th Cir., 1971), *cert. denied,* 405 U.S. 974 (1972); *Taylor* v. *United States,* 390 F.2d 278, 284-285 (8th Cir.), *cert. denied,* 393 U.S. 869 (1968).

[14] The "vital interest" of informers is often greater than someone like Mr. Stout—a person who takes his oath and duties seriously. Yet no such instruction is allowed by the Seventh Circuit on paid informer testimony. See, *U.S.* v. *Wright,* 542 F.2d 975 (7th Cir., 1975).

F. As A Matter Of Law, Count IV Should Have Been Dismissed.

With the IRS "all over" Mr. Stout for a number of years, his dramatic increase in withholding "allowances" was surely a political protest protected by the First Amendment from a criminal prosecution, as a matter of law. *U.S.* v. *Snider,* 502 F.2d 645 (4th Cir., 1974). Count IV should have been dismissed, or, at the very least, it should have been severed.

We submit that this prosecution was offensive of currently accepted Due Process standards of fair play. We submit that under these circumstances, the burden is on the prosecution to show that the verdict could not have been tainted. *Chapman* v. *California,* 386 U.S. 18 (1967) and *Kotteakos* v. *U.S.,* 328 U.S. 750 (1946).

III.

THE IRS INVIDIOUSLY SELECTED STOUT FOR CRIMINAL PROSECUTION BECAUSE HE WAS AN OUTSPOKEN (FIRST AMENDMENT) CRITIC AND TAX PROTESTER AND THE COURT SHOULD HAVE HELD A HEARING ON HIS PRETRIAL MOTION TO ALLOW THE GOVERNMENT AN OPPORTUNITY TO DISPROVE THE PRIMA FACIE SHOWING HE MADE.

Stout presented a Motion which thoroughly documented that he had been selected for prosecution because he was a "vocal" tax protester. That documentation made a *prima facie* case which required the holding of an evidentiary hearing.

The "political" nature of this prosecution became more obvious as the case proceeded.[15] A report of an IRS inter-

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[15] Rule 16 material showing further political file keeping was turned over in the middle of the trial by the prosecutor. In addition to this material, *in camera* material was submitted which never got into the District Court file until after oral argument on the appeal.

view of Stout, conducted on January 11, 1974, clearly indicates the IRS intent:

> Mr. Stout was further questioned about being a member of the Illinois Tax Rebellion Committee and he responded by saying he was not a member. He did invoke the First and Fifth when asked if he ever attended any of the meetings of the Illinois Tax Rebellion Committee. He insisted that we include the First Amendment in our notes because he felt this was his right to associate with anyone he wished. He also invoked these amendments when he was asked if he intends to attend meetings in the future.

Clearly, activities of the IRS are such that lawful meetings have been infiltrated; prostitutes hired; spies utilized; and SSS programs established. This, as with the Co-Intel Program of the FBI, are all well-known and documented historical facts.[16]

The IRS collected Stout's newspaper clippings and monitored his appearance on radio shows. However, the IRS did not choose to prosecute those who wage quiet revolution,[17] nor does the IRS wish to criminally prosecute the 5-10 million "little" people who are non-filers, because of the "P.R." problem this might cause. We submit, however, that this is a governmentally impermissible reason for exercising such restraint. A law applies equally to everybody.

At a hearing, proof would have been submitted establishing that no indictments were returned by the Special

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[16] See, e.g., *Teague* v. *Alexander*, Docket No. 75-0416 (D.C.D.C.) and, also, authority cited in the Petition for Writ of Certiorari in *Stewart* v. *Illinois*, Docket No. 78-1293.

[17] It is well-known, and this Court should take judicial notice of the fact, that lawyer, Albert Jenner, as reported, didn't file for at least 3 years and yet, he was never prosecuted. It is untrue for Judge Sprecher to state that Stout didn't name "others."

Grand Jury which didn't involve "vocal" tax protesters. Moreover, the numbers of responsible gray-headed individuals, such as Paul Stout, who are "taking the fall" *because of IRS revenue shortfalls,* are increasing dramatically. Rather than stopping the shortfall, such activity only serves to exacerbate and nurture convictions of righteousness.[18]

The leading case, after *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) on prosecutorial discretion is *U.S.* v. *Falk,* 479 F.2d 616 (7th Cir., 1973).[19] According to the Court:

> . . . when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, a prima facie case is established. *Id.* at 620-621.

The existence of selective and arbitrary prosecutorial selection violates Equal Protection concepts because the government, acting through the prosecutor, singles out an individual or group of individuals for treatment that is *inherently different* from that accorded to another individual or group that is similarly situated. Equal Protection of the Law is directed at every form of governmental action—legislative, executive, and judicial—*Shock* v. *Tester,* 405 F.2d 852, 855 (8th Cir.), *cert. denied* 394 U.S. 1020 (1969). Furthermore, Equal Protection prohibits discrimination against individuals, not merely against classes of people. *Snowden* v. *Hughes,* 321 U.S. 1, 8 (1944); *Falk supra.*[20]

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[18] Such injustice fuels a revolution and fans the fires of hate.

[19] See, also, *U.S.* v. *Steele,* 461 F.2d 1148 (9th Cir., 1972) (Census protester) and *U.S.* v. *Crowthers,* 456 F.2d 1074 (4th Cir., 1972) (Pentagon demonstrator).

[20] We have asserted that the class of people affected here are those who exercise their First Amendment Right of Free Speech and Political Expression.

Consequently, it appears that one seeking to prove selective prosecution must establish two things: first, he must show that he has been discriminated against (the government admits this and states that it was permissible to do so) and second, he must show that the discrimination was based on a purposeful application of an arbitrary and impermissible standard. (We submit that it is impermissible only to go after those non-filers who are "vocal tax protesters").

Several commentators have urged that a demonstration of purposeful discrimination, absent a showing of an arbitrary and impermissible standard, should be sufficient to establish a violation of the Equal Protection Clause, (See, e.g., Giliver, "The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law," 1973 U. Of Ill. Law Forum 88). This does not appear, however, to be the present state of the law.[21]

What the selective prosecution defense is all about—really—is an awareness by the judiciary of its role as intermediaries, consciences, between the Executive and the People. As stated by Mr. Amsterdam in his excellent treatment of the subject:

> The fear of some judges that a flood of selective prosecution challenges will result from an acceptance of this defense (fn 169) has not been borne out by the cases. Yet even if their fears had come true, that reality should bear in no way upon the validity of the defense of selective enforcement (fn 170), for the courts, as intermediaries between an increasingly oppressive government and an increasingly aware citizenry, must bear the responsibility for upholding the

[21] Other articles on the subject include: Vol. 13 *The American Criminal Law Review* 383 (1976); M. L. Amsterdam, 6 *Rutgers-Camden L.J.* 1 (1974); Dinston, 62 *Cal. L. Rev.* 1 (1974).

> Constitution and for protecting the people from infringement of their rights. Amsterdam, *supra* at 25.

The Judicial Branch of government, during the Vietnam War, *eventually* did side with the People. The Courts reacted well to Nixon's unlawful impoundment programs.[22] A courageous Judge Sirica brought down President Nixon and the *Falk* decision was issued.

In those days, the "activists" were young. Presently, it is those courageous gentlemen and ladies with "white tops", such as Mr. Stout, who still carry the torch of liberty.

It is now to the Supreme Court to whom we appeal for *reason* and an end to the current IRS bloodletting.[23] The tax protest Movement is anti-war and pro-life. It recognizes that governments make war—not people.

We submit that the *Falk* doctrine is as equally applicable to tax prosecutions as it was to selective service prosecutions only a few years ago.

Mr. Stout did not desire to "create immunity from, or a defense to, prosecution" by his display of "antipathy" to the income tax. He sought to speak the truth as he believed it and to practice as he preached. Here, however, the jury was never able to assess whether Stout's beliefs were held in good faith. The trial was a "railroad."

[22] See, e.g., *Illinois, et al.* v. *Weinberger*, 368 F.Supp. 721 (N.D. Ill. 1973).

[23] Our extensive Appendix and Supplemental Appendix in the Court of Appeals provided a sampling of the magnitude and geographic breadth of the IRS reaction to the "protest." The judiciary must again act to put an end to the IRS's War against the People of this country. These prosecutions only serve to exacerbate growing friction. See, Samson, Joan, "The Auctioneer", Avon Books, 1975 (8th Ed.) for the result of such a policy. Article III, Section 3 of the Constitution states that treason shall consist of "levying War against them. . . . " Congress has already started a "cutback" of IRS informer authority. See, Proceedings before the House of Representatives, July 13, 1970, Cong. Record at H5874.

Furthermore, we submit that the decision of *U.S.* v. *Kahl*, 583 F.2d 1351 (5th Cir., 1978),[24] so heavily relied upon by the Seventh Circuit, is unalterably in conflict with its previous decision in *Falk* and this Court's decision in *Yick Wo*. *Kahl* permits the IRS to criminally prosecute *only* those who speak out about their beliefs of what the tax law is or should be—*to the exclusion of all other prosecutions.*

We submit that the IRS should not be given a charter which allows them to ignore 5-10 million non-filers. It offends the Constitution to allow the IRS to concentrate *only* on those who exercise their First Amendment Rights in their attempt to lawfully change the "system" for the better. See, GAO Report, "Who's Not Filing Income Tax Returns? IRS Needs Better Ways to Find Them and Collect Their Taxes." (July 11, 1979, #GGD 79-69).

During 1978, according to a report in the National Law Journal of August 13, 1979, there were 2,681 criminal cases closed out of the IRS Chief Counsel's Office. How many of these were "failure to file" cases can only be estimated at, *say*, a quarter of such cases or 670 cases. Out of the 2681 cases 1,815 were prosecuted. Assuming the same quarter as non-filer cases, we arrive at a rough figure of 454 non-filer prosecutions. Therefore, assuming the accuracy of our "breakdown", 454 were prosecuted in 1978 out of a potential pool of prosecutable individuals of 5-10 million.

We submit this is a grossly unbalanced exercise of prosecutorial discretion. If *Kahl* is allowed, as support for these IRS activities, it will inevitably lead to the submersion of the entire *vocal* tax protest movement into the "underground."

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[24] The "rule" of *Kahl* was not argued to the trial Court and, as we pointed out, should not have been utilized by the Court of Appeals.

Hitler stopped free speech and thereby almost destroyed Germany. The erosion and take over of the judicial system, as a protective barrier between the People and the government, was one of the first steps he took upon gaining "legitimacy."[25]

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

PAUL STOUT
By: SHELLY WAXMAN
His Attorney

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30 W. Washington Street
Suite 1115
Chicago, Illinois 60602
(312) 782-1360

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[25] See Appendix A-28 for IRS documents which confirm the collusion between the Federal Judiciary and the IRS to indicate that the process has commenced here in America—"the land of the free and the home of the brave." More recent Internal Revenue Manual Supplements entitled "Examination and Investigation of Illegal Tax Protest-type Activities, dated January 10, 1979 indicate that the "Public Affairs Office" and the IRS "speakers cadre" should be involved with the judiciary.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-2225

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL R. STOUT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 CR 906 — GEORGE N. LEIGHTON, *Judge.*

ARGUED JUNE 5, 1979 — DECIDED JULY 3, 1979

Before PELL and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This appeal is from the conviction of the defendant for failing to supply information to the government relative to his federal income tax.

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

I

The defendant was indicted in four counts, the first three charging him with failure to file returns, supply information, or pay federal income tax for the years 1973, 1974 and 1975, in violation of 26 U.S.C. § 7203[1] and the fourth count charging him with supplying a false or fraudulent statement or failure to supply information in 1974, in violation of 26 U.S.C. § 7205.[2] The jury found the defendant guilty on all counts and he was sentenced to one year incarceration, five years probation and a fine of $6,500.

During the years in question, the defendant was employed by Quaker Oats Company, which issued W-2 forms to the defendant, indicating wages of $30,342.88 in 1973, $23,841.79 in 1974, and $25,741.27 in 1975. During these

[1] 26 U.S.C. § 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] 26 U.S.C. § 7205 provides:

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

same years the defendant filed a W-4 form with his employer in which he claimed 34 Withholding allowances. The defendant is married and has three children. Due to the 34 allowances, no money was withheld by the employer for federal income tax in the three years. No returns were timely filed for 1973, 1974 or 1975.

On February 17, 1977, the defendant filed a 1973, a 1974 and a 1975 Form 1040, which were completely blank except for taxpayers' (husband defendant and wife) names, address, the defendant's social security number, filing status, claiming of three exemptions, the first name of one dependent child, and two asterisks (**) opposite each line. Each form had attached to it 48 pages, one of which explained the double asterisks as meaning:

> Specific objection is made to this question under the Fifth Amendment, U. S. Constitution, as to Federal Reserve Notes and rights under said Amendment; and similar objection is made to the question under the First, Fourth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, and Sixteenth Amendments.

The other pages of attachments included affidavits by the defendant that he was confused about the meaning of "dollars"; a copy of the Constitution of the United States; copies of what are apparently the partial contents of the Internal Revenue Service's files as of July 20, 1976, relating to the defendant, obtained by him in response to his Freedom of Information and Privacy Act requests; copies of newspaper clippings; copies of letters by the defendant to several Congressmen complaining that the I.R.S. was collecting dossiers of newspaper clippings containing defendant's various letters-to-the-editor critical of the I.R.S. and some of the Congressmen's replies to the defendant.

In none of the above material was any information given in regard to the defendant's or his spouse's income or was

any information furnished from which such income could be determined.

II

The defendant has appealed his conviction upon several grounds, the first of which is that he was selectively prosecuted, relying primarily upon *United States* v. *Falk,* 479 F.2d 616 (7th Cir. 1973). In *Falk* the defendant, who was prosecuted for failure to have in his possession a selective service registration card or a draft classification card, had offered to prove that over 25,000 persons had dispossessed themselves of their draft cards, that the government had published its policy not to prosecute violators, that Falk was an active and vocal dissenter to the draft and the Vietnam War, that he was advised by a government prosecutor that he had been singled out for prosecution because of his anti-draft activities and his prosecution had been approved by a chain of high officials of the Justice Department.

The only one of these various *Falk* facts that the defendant here showed was that he was an active tax protestor, but he did not show that the government has a policy of not prosecuting other persons who fail to file their returns or supply information. All that he showed was that his activity may have attracted attention that he was likely to be violating the tax laws, which situations the government prosecutes to the extent that it has knowledge of the violations and to the extent of its physical capabilities to prosecute the volume of cases presented.

Virtually the same kind of showing in similar cases has uniformly resulted in a holding of failure to establish selective prosecution. *United States* v. *Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974); *United States* v. *Swanson,* 509 F.2d 1205, 1208-1209 (8th Cir. 1975); *United States* v. *Scott,*

521 F.2d 1188, 1195 (9th Cir. 1975) ("Appellant fails in his claim of discriminatory prosecution because he had not demonstrated that others similarly situated who have failed to file income tax returns have not been prosecuted."); *United States* v. *Gardiner,* 531 F.2d 953, 954 (9th Cir. 1976) ("[A]ppellant was in clear violation of the law and the authorities had no choice but to prosecute him."); *United States* v. *Kahl,* 583 F.2d 1351, 1353-1354 (5th Cir. 1978). As the court observed in the *Scott* case at 1195:

> It is not surprising that the government might prosecute those cases in which the violations of the tax laws appear most flagrant.

Aggressively displaying one's antipathy to the income tax system or daring the government to enforce it does not create immunity from, or a defense to, prosecution.[3] So long as the government also prosecutes other delinquent taxpayers there is no discrimination. Nor did the defendant make any showing sufficient to require an evidentiary hearing on that subject.[4]

III

The defendant has argued that "this prosecution violates the public policy which encourages the filing of tax forms." The argument seems to be that the defendant was punished merely for filing the three blank Form 1040 returns.

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[3] The defendant objected, by means of a letter to President Ford, to an I.R.S. attempt to learn from his employer the tax information which he denied them, in which letter he demanded that the president "report to me within ten days." In a letter to a revenue officer the defendant says "send me a statement signed under penalty of perjury, that this is the exact amount of [telephone] tax that I owe."

[4] Defendant conceded that he was not prosecuted because of his race, religion, color or national origin.

In the first place, we held in *United States* v. *Jordan,* 508 F.2d 750, 752 (1975), *cert. denied,* 423 U.S. 842 (1975) that:

> In filing I.R.S. forms 1040 containing only the defendant's name, address, Social Security Number and a blanket declaration regarding his Fifth Amendment privilege, defendant failed to file a return as required by law.

See also, *United States* v. *Porth,* 426 F.2d 519, 523 (10th Cir. 1970), *cert. denied,* 400 U.S. 824 (1970); *United States* v. *Daly,* 481 F.2d 28, 29-30 (8th Cir. 1973), *cert. denied,* 414 U.S. 1064 (1973); *United States* v. *Johnson,* 577 F.2d 1304, 1310-1311 (5th Cir. 1978).

Second, the defendant was a target of criminal prosecution prior to his filing the untimely blank returns on February 17, 1977.[5] In fact about ten months earlier on April 28, 1976, I.R.S. agents had read the defendant his Constitutional rights. Therefore, he was not punished for filing the blank returns but for failure to file timely returns.

Finally the defendant has shown no policy of I.R.S. that tends to encourage the filing of blank returns.

Next the defendant argued that the evidence submitted by the government concerning the amount of his income and obtained through the use of an I.R.S. administrative summons while the grand jury proceedings were in progress should have been suppressed. The record does not show if and when an I.R.S. summons was used and, if used, whether a grand jury investigation was then in progress. Lacking these facts, we cannot speculate about them.

The defendant also argued that it was improper for the Court to allow admission of evidence of the defendant's

[5] The indictment was filed on September 21, 1977.

prior and subsequent conduct as to filing tax returns. This evidence supports a finding that the defendant knew that he was required to file returns and that therefore when he failed to file them, he did so willfully.

We have often approved the admission of such evidence. *United States* v. *Farris,* 517 F.2d 226, 229 (7th Cir. 1975), *cert. denied,* 423 U.S. 892 (1975); *United States* v. *McCabe,* 416 F.2d 957, 958 (7th Cir. 1969). See also, F.R.Evid. 404(b).

The defendant next argued that the court erred in giving the following instruction:

> A defendant who wishes to testify is a competent witness and his testimony should not be disbelieved merely because he is a defendant. However, in weighing his testimony, the jury should consider the fact that the defendant has a vital interest in the outcome of his trial.

We have held that this instruction is not prejudicial in *United States* v. *Crovedi,* 467 F.2d 1032, 1035-1036 (7th Cir. 1972), *cert. denied,* 410 U.S. 990 (1973), but the defendant has argued that it should be reversed. We decline to do so.

The defendant has argued that the sentence was excessive, being one year of incarceration, five years probation, and a $6,500 fine. The maximum possible sentence was four years of incarceration and a $30,500 fine. In *Dorszynski* v. *United States,* 418 U.S. 424, 440-441 (1974), the Chief Justice quoted the often reiterated statement that:

> If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.

The defendant finally complained that his "probation is conditioned on the timely filing of tax forms." In *United*

States v. *Kahl*, 583 F.2d 1351, 1356-1357 (5th Cir. 1978), the court said:

> Kahl challenges the order of the district court requiring him to provide copies of his income tax returns during the period of his probation. . . . In light of the crime of which Kahl was convicted, the conditions placed upon his probation were reasonable and clearly not an abuse of discretion.

The defendant has raised some other issues which we have considered and rejected. The judgment of conviction is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 10, 1979

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 78-2225

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PAUL R. STOUT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 CR 906
GEORGE N. LEIGHTON, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

cause by Paul R. Stout, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

EASTERN DIVISION

Honorable GEORGE N. LEIGHTON, *Judge*

Cause No. 77 CR 906-1

June 19, 1979

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PAUL R. STOUT,

Defendant-Appellant.

MOTION

Re in camera submission No. 1.

In camera submission No. 1 returned to clerk's office to be placed in vault. Documents are in a sealed large tan envelope.

Docketed June 20, 1979.

Leighton, J.

APPENDIX D

TRANSCRIPT OF ORAL ARGUMENT IN
U.S.A. v. *STOUT*

(Court of Appeals for the Seventh Circuit) from June 5, 1979:

Judge Sprecher — Judge Pell — Judge Campbell

WAXMAN: May it please the Court, my name is Shelly Waxman and I represent the Defendant, Paul Stout. Mr. Stout is seated at the table.

This is an appeal from a conviction on a four-count indictment; three counts for misdemeanor, failure to file a return and one count regarding a false withholding statement that was presented to Mr. Stout's employer and that's the way the indictment reads . . . to his employer, not the United States government . . . to Quaker Oats Company. The indictment, on count one, two and three, reads that the returns for 1973, 1974 and 1975 were not filed on or before April 15.

Now this is a crucial situation because all of the confusion that later followed, during the trial of this case, related to the fact about whether we were talking of a no file case or a late filed case and I submit that the jury had to be confused during the entire course of the trial as to what was meant by failure to file a return. Mixed in with this was the concept. . . .

PELL: Did the Judge read the instructions to them pertaining to the statutes?

WAXMAN: The Judge read from . . . the Judge gave the indictment to the jurors without any excision of signatures or the designation that the Grand Jury that was sitting was a Special Grand Jury. In other words, the document itself was handed to the jury, verbatim.

PELL: Well, my question was, did the jury know the statute with which he was being charged with?

WAXMAN: Yes, they did; but, your Honor, I submit that the confusion is caused over the fact that Mr. Stout did file returns and that the government has now conceded that what was filed was returns. They may have been filed late, but they were filed. In the confusion to the jury, I submit . . .

PELL: The forms were filed, you mean.

WAXMAN: They call them 1040 returns in their brief and I would state that at page 7 of my initial brief, there's a chart that graphs the entire sequence of events in this case. It's found at page 7 and I would ask your Honors to read along with me on it. From 1966 to 1970, Mr. Stout filed returns; they're called conventional returns; 1968, 69 and 70 were filed timely; 66 and 67 were out of time; 71 and 72 were filed at the request of a special agent and were conventional returns. The reason why Mr. Stout did not file those returns was because, as he stated during the trial, there were refunds due him and he desired to collect the interest, as was the policy of the government. Now the years under indictment are 73, 74 and 75. These were submitted in February of 1977 because of a letter from the IRS General Counsel indicated that Mr. Stout might be . . .

PELL: That would make that some sort of prima facie case for late filing, wouldn't it?

WAXMAN: Well, your Honor, the offense is supposed to be complete as of the date of the filing. In other words,

as of April 15th of every year, both the Judge and the government, before the jury, indicated that the offense under this statute is complete as of that date. Now, we get into later arguments about the propriety of allowing previous and subsequent conduct into evidence in the case.

PELL: Well, all I'm asking is that a return which was supposed to be filed April 15, 1974, which was not filed until April 15, 1977 . . .

WAXMAN: There was no dispute, there was no dispute about when it was filed or what it said. They were actually introduced and they were presented to the jury. The government prosecutor had difficulty in the language that he used to call them and during the course of the trial they were called different things: sometimes a piece of paper, sometimes a return, sometimes tax form. But, in fact, there was no dispute that they had actually been filed, and that they had actually been filed late.

They were, in fact, actually filed pursuant to a request from the Internal Revenue Service that they be filed. Now, because of the fact that Mr. Stout was advised (he was) subject to criminal prosecution, he filed a Fifth Amendment return. He said I'm taking the Fifth Amendment because you've advised me that I may be prosecuted. Jeopardy cannot be any more clear under those circumstances.

At the beginning of the trial there was a representational problem; just prior to trial, Mr. Stout's appointed counsel said that he had a, I believe he called it, a conflict with regard to how to proceed in the case. I submit that the Record reflects that Mr. Stout proceeded reluctantly with Mr. Mann as his attorney and I submit to the Court that under those circumstances, it was really impossible for Mr. Stout to be adequately represented by a counsel who said that they differed on trial strategy.

Now, the issues in the case . . . the result by the way, was that Mr. Stout is under 12-month's sentence with 5 years probation conditioned so that he file returns as Judge Leighton said "as provided by law."

Now, I haven't taken all the issues in my brief because time doesn't permit it. The main issues are, and I don't want the Court to construe that I've waived any issues in that regard . . .

PELL: We understand.

WAXMAN: We submit that this prosecution was a selective prosecution against an avowed First Amendment tax protester. We submit that *Falk* is controlling; I know your Honors are familiar with that case; I know that Judge Sprecher wrote the opinion, and that your Honor, Judge Pell, wrote the, one of the dissents in the case.

I would state that, your Honor, that the Law Review article at p. 21 of my brief, which was written by Mr. Amsterdam, indicates that with regard to the *Falk* case, the horrible result that your Honor projected for the *Falk* case, it never, it never did occur. The defense of selective prosecution only comes about in unusual cases and the *Falk* case has not unleashed a flood of progeny nor a flood of this defense being utilized in the District Court, as your Honor impliedly projected. As Mr. Amsterdam said, "the fear of some judges that a flood of selective prosecution challenges will result from an acceptance of this defense has not been brought out by the cases—yet, even if our fears have come true, that reality should bear in no way upon the validity of the defense of selective enforcement. For the Courts, as intermediaries between an increasingly oppressive government and an increasingly aware citizenry must bear a responsibility for upholding the Constitution and for protecting the people from infringement of their rights."

Now, the other cases which we rely on are *U.S.* v. *Steele,* which is a census protest case in which an individual refused to take part in the census. I note that 1980 is coming up and we'll probably have to go through those issues again on those types of individuals.

U.S. v. *Crowthers* was a Pentagon demonstration in which the Defendant pleaded and proved that he was picked on—that he was selected.

The government's answer to our claim of selective prosecution is an interesting one. They claim that if all tax protesters are picked on by the government, in terms of criminal prosecution, that is sufficient to meet the criteria of non-selectivity.

Now, they would be right in that argument if the crime here was "tax protest". If, in fact, the pool from which they were drawing their prosecutions was "vocal", "tax protest", however, the actual crime that was on indictment here is not filing or late filing of a return and we submit that we made a prima facie case for the selectivity here, which they're admitted in their brief. They admit that they're going after tax . . .

PELL: They admitted that you made a prima facie case . . .

WAXMAN: No, I'm sorry.

PELL: Alright.

WAXMAN: They admit that they are going after only tax protesters on this issue. However, in my Supplemental Appendix and Reply Brief, there's an indication that we're talking about in Dade County, 300,000 taxpayers who have failed to file as of April 15, 1977—we would submit that like statistics are applicable in this District. That being the case, if out of those 300,000 late-filers, the government

picks on only those people who are protesting, we submit that that is a prima facie case of selective prosecution. Now . . .

PELL: Would it make any difference if many of those people who filed late, when approached by the government, got right with the government and filed their tax return—now, as I recall in this case, there were a number of contacts with Mr. Stout; there's warning to him—this went over a period of time before and finally prosecution. Am I right?

WAXMAN: That is correct, your Honor, and, as a matter of fact, as a result of those contacts . . .

PELL: Can you equate him with those people like the attorney in your brief that had been in the newspapers had not filed at all. Now, if those cases can be worked out by approaches from the agents, so that the return is filed and the appropriate tax is paid, then that kind of case can't be necessarily equated with Mr. Stout's case, can it?

WAXMAN: If the agents could guarantee that individuals would not be criminally prosecuted for filing returns, which they can't because this is a perfect example of what happens if you file a return after you've been told to do so . . .

PELL: They didn't make any promises.

WAXMAN: Well, if that could be guaranteed. Look, if this gets out, I speak frankly to the Court, if people who are not filing or are holding off for whatever reason—economics is a big one right now, and they're advised that they may suffer a criminal prosecution for filing a return, I frankly think that if I were one of them, I'd stay out of the system entirely. And that's a continuation . . .

PELL: Your logic lost me there.

WAXMAN: Well, your Honor, as I said in the chart on page 7, Mr. Stout filed his returns . . .

PELL: What system are you talking about staying out of—you mean the territory of the United States or what?

WAXMAN: The tax system; the so-called voluntary tax system and I put that . . .

PELL: You mean if you knew you were going to be prosecuted, you just wouldn't file.

WAXMAN: Absolutely.

PELL: Well, you've lost me there . . .

WAXMAN: Well, your Honor, these 300,000 people down in Florida who didn't file . . .

PELL: If I knew I was going to be prosecuted for stealing, I would steal, therefore, is that the gist of your argument?

WAXMAN: Judge, I assume that the American public desires to comply with the law.

PELL: Yeah.

WAXMAN: I assume that the people are not at war with the government. I assume only that the Internal Revenue Service is at war with the people. If the Internal Revenue Service takes Mr. Stout as an example and uses him to indicate that whether you file or not, you're going to be involved in a criminal prosecution if you're a tax protester; a vocal tax protester, and the people out there realize that all they have to do is file a return and they may be criminally prosecuted, they won't file a return. It's as simple as that.

Now, Judge Leighton, submitted in the government's brief at page 9, said that this was a political prosecution . . . and yet he denied a hearing on the issue of selectivity.

He even admitted it in the transcript at page 70 that Paul Stout was acting in good faith. This was a case that relied heavily on a good faith defense and any portrayal of Mr. Stout as a bad person; as somebody who perused Playboy magazine or whatever magazines that he dealt with—as the prosecutor waved the check in his hands and says "oh! I've got a good one here" . . .

PELL: I don't know that Playboy magazine readers are any better or worse taxpayers than anybody else.

WAXMAN: Your Honor, Mr. Gilkerson obviously felt that was the case. The . . . what we have here is political dossiers on Mr. Stout. Some of the political dossiers against him were not submitted to his attorney until mid-stream in the prosecution! Rule 16 was violated here—it wasn't complied with until after the government's case. Now, we submit that this is a case that should go back to the trial court for a hearing on selective prosecution; a prima facie case has been made and we believe that *Falk* dictates and mandates that this be accomplished.

Now, as to the errors in the trial, we submit that the totality of all the errors in the trial, in accordance with standards of *Kottiokos* and *Chapman,* was that this trial did not comply with current notions of fair play. The . . . and I recall arguing a case before Justice Clark, cited in my brief, *United States* v. *Marrerro,* which was a drug prosecution, I was an Assistant United States Attorney at the time and the subject of *Kottiokos,* which he wrote came up and he let me know, in no uncertain terms, what that case said and the decision of *U.S.* v. *Marrerro* reversed a conviction for a drug sale, indicated that Justice Clark took *Kottiokos* very seriously. Now, the . . . and I notice that Judge Sprecher recently, in a case that's not cited in my brief, but in *United States* v. *Dolliole* indicated . . . I think it's D-O-L-L-I-O-L-E, 78-1697, indicated, with regard to

other crimes evidence, that prior criminal activity can only be found if it's clear and convincing to the jury.

PELL: Can you give that citation to your opponent? We seem to have a rash this morning of late discovered cases. This subject just came out?

WAXMAN: Yes, 78-1697. Here, if you look at the chart, we're not even talking about related other crimes evidence. There's no question that Mr. Stout filed these returns that were used as prior acts . . . there's no dispute that he filed the returns subsequently. How in the world can *U.S.* v. *Ming* be utilized by the government in a case like this, when Mr. Ming didn't file at all? It's not related in the slightest! This evidence was produced solely to dirty up Mr. Stout. It's a very effective way of doing it; it always is an effective way in prosecutions but, at least, in the prosecutions that have normally occurred, it's related in some ways—it's not even related! And this added to the confusion to the jury. Is this a late case or a no filing case?

Now, the instructions, your Honors, I submit, that the instruction that relates to how the Defendant's testimony is to be taken, is something that this Court should get . . . this Circuit should get rid of. The Eighth Circuit doesn't like it and I really—I think it's archaic and I don't know why this Court is hanging on to that particular instruction. That is the instruction that the Defendant has a vital interest in the outcome of this trial. Well, of course, so does the government! And this Court has refused to allow that instruction to be used on an informer.

PELL: . . . unless you think the government is hell-bent on persecution—their interests are different. You were an Assistant United States Attorney. You know you go on to the next case. You don't like to lose cases, of course. But the interest is different; I think we pointed that out.

WAXMAN: I don't see it at all, your Honor. I don't think the instruction should be given . . .

PELL: . . . well, I know you don't agree with it . . .

WAXMAN: I understand.

PELL: The Court has said it . . .

WAXMAN: I understand but the case is—if you look at your own cases they're very weak on whether you like this particular instruction that the Defendant has a vital interest in the outcome of this trial . . . this Court has refused to give—to allow that instruction to be given when informer's testimony is being used. And we know that informer's have a vital interest in the outcome of the case—they get paid for it! William O'Neal got paid for it—he had a vital interest in the testimony. Now, another aspect of the case and I'll conclude shortly.

PELL: Well, you'll have to.

WAXMAN: Alright. Improper use of the Grand Jury—my contention, your Honor, is that Stout was a target of the Special Grand Jury and the IRS, instead of going the Grand Jury route, they went out and did administrative summonses. This Court has chastised the U.S. Attorney's Office for going on an instanter subpoena, serving its instanter Grand Jury subpoenas, certainly, this is an equivalent situation. We claim that Count IV was a protest as a matter of law. They were on Mr. Stout's back. *U.S.* v. *Snider* covers that. In conclusion, we ask this Court for relief.

Tax protesters are law-abiding citizens and they do not desire to make war with the government. However, until such time as this Court advises the Internal Revenue Service, through its decisions, that it will not stand for these kind of prosecutions, I see nothing but more and more indi-

viduals resisting compliance with the Infernal Revenue Code. Thank you, your Honors.

Oh, your Honor, I would make a Motion to supplement the Record on Appeal to include the Motion for New Trial that the government referred to as missing from the Record.

PELL: Any objections? . . . hand them to the Clerk.

SOLOTOROVSKY:

Good morning, your Honor, Julian Solotorovsky on behalf of the United States government. Before I get started with any of the issues, I'd like to point out one difference we seems to have with Mr. Waxman with regards to his Statement of Facts. We do not, on page 9 of our brief, state that this was a political prosecution. To the contrary, if I might quote briefly, on page 9, we say, "the trial judge . . .

PELL: I didn't hear him say that you said that; he said Judge Leighton said it and . . .

SOLO: Well, Judge Leighton didn't say it either and it's clearly set out in a quote in Judge Leighton's decision with regards to the issue of selective prosecution—that he says, that rather than showing that the government initiated political prosecution of Mr. Stout, these documents disclose that Mr. Stout had initiated a political diatribe with the Internal Revenue Service. So it is not stated by Judge Leighton—or by the government that this was a political prosecution. We would also like to point out mainly in this argument, your Honor, that this is a case where the government did not allege that Mr. Stout filed a return, rather, we alleged that Mr. Stout filed no returns for the years 1973, 1974 and 1975. As we set out in our brief, Mr. Stout did in fact file with the IRS Service, four 1040's

that are considered returns in name only. The returns that he filed did not contain any figures which would enable anyone, including the IRS Service, to figure out Mr. Stout's tax liability. And that is a key consideration in deciding whether or not a piece of paper is, in fact, a return, as is needed by the IRS to figure out one's tax liability. On page 14 of our brief, on footnote 5, we point out this fact that there are numerous cases that have held that a 1040 return with no figures on it is not, in fact, a return. To be a return it has to have sufficient figures to enable IRS to figure out the tax liability. So, contrary to what Mr. Waxman would have us believe, it is not a situation of simply filing late returns; it's a situation of no return being filed at all.

PELL: Well, that's not what he's being prosecuted for —he's being prosecuted for late filing, I think?

SOLO: No, your Honor, I believe it's for not filing a return. I would also point out, your Honors, that when the IRS receives such documents—1040 forms that contain no figures—then it is the policy of the IRS at this time to send a letter to the person that filed the form, indicating that this is not a return for the purposes of determining the tax liability and that they should, indeed, file new returns indicating their expenses and their income so the tax liability can be determined.

I'd like to move on now to the question of selective prosecution. As set out in the *Falk* case, which your Honors, are, of course, well aware of, the Defendant has the burden of coming forth with the contention that there has been an invidious selective prosecution on the part of the government. In doing so, the Defendant must show that others similarly situated have not been prosecuted and, too, that the selection of the Defendant in this particular case for prosecution, was in bad faith . . . say, because of his race, his religion or because he was exercising constitutional rights.

In this case, we would contend that Judge Leighton is correct when he held at the pre-trial stage and at the post-trial stage that the Defendant never went forward with this burden of showing that there was in fact bad motive on the part of the government in prosecuting Mr. Stout.

Mr. Stout, never, at any time, indicated other individuals who were taxed—tax law violators who were not being prosecuted—on the basis, Judge Leighton refused to go forward with the hearing and we would submit that this was the correct procedure.

The Petitioner relies on the *Falk* case and we would point out that the *Falk* case was a case that dealt with . . . selective service violations. A case that is more on point, since *Falk* would be the *Kahl* case, which is a Fifth Circuit case which came down last year and we discuss in our brief. The *Kahl* case applied the *Falk* case in a tax protester situation and the facts in that case are somewhat similar to the case that is before your Honors this morning and we would submit that that is in fact the controlling case and we would point out in that case that it was held that the Petitioner had not met the burden of establishing a *prima facie* case of invidious selective prosecution on the part of the government.

PELL: Maybe you could clarify for me . . . Now, he was indicted under Section 7203 which includes in it—who wilfully fails to make such return at the time or times required by law or regulation. . . . Now that was the Section he was indicted under. Doesn't that deal with the matter of timely filing?

SOLO: Yes, it would, your Honor. But I think what was proved up by the testimony at trial . . .

PELL: . . . We—it was proved up that he didn't file them when they were supposed to be due, isn't it?

SOLO: That's correct, your Honor—it was also proved up that IRS informed Mr. Stout that what he had actually filed was not, in fact a return . . .

PELL: . . . that was filed two or three years later though.

SOLO: That correct, your Honor, 1977.

PELL: But I thought you told me a minute ago that he was indicted for not filing a return at all . . .

SOLO: Your Honor, I did not try the case . . .

PELL: Well . . .

SOLO: I will check it and verify it . . .

PELL: I have it right here . . .

SOLO: OK, your Honor.

PELL: Section 7203 which says failure to file on time.

SOLO: Correct, your Honor.

PELL: Well . . .?

SOLO: That would . . . that would . . . that would weigh in our favor that . . .

PELL & SOLO (—incoherent . . . they're talking at once).

PELL: You didn't try the case, but I assume you came here prepared—having read the record.

SOLO: Yes, your Honor, but I would point out that that the question now of whether or not what he did in 1977 would have no bearing . . .

PELL: They would, of course, be extenuating circumstances . . .

SOLO: Correct, your Honor. Your Honor, if you have no further questions, the government would rest on its brief.

(Judge Pell talking to Judge Campbell).

PELL: You used up all your time, Mr. Waxman, so this case will be taken under advisement.

APPENDIX E

CHART

TAX YEAR	DATE OF RETURN	TYPE OF RETURN	COMMENTS
1966	Dec., 1967	Conventional	
1967	Apr., 1969	Conventional	
1968	Timely	Conventional	
1969	Timely	Conventional	Audited
1970	Timely	Conventional	
1971	Jan., 1974	Conventional)	Submitted at request of Special Agent Neuchterlein. Audited.
1972	Jan., 1974	Conventional)	
1973	Feb., 1977	Fifth Amend.)	Submitted as response to notice by IRS gen. counsel of possible criminal action for failure to file.
1974	Feb., 1977	Fifth Amend.)	
1975	Feb., 1977	Fifth Amend.)	
1976	June, 1977	Fifth Amend.	
1977	Timely	Conventional	

APPENDIX F

MEMORANDUM

February 26, 1973

Received February 27, 1973

Intelligence Division — Los Angeles, Calif.

to: Participants in Conference on Tax Rebellion Movement

from: Regional Commissioner
Western Region

subject: Tax Rebellion in California

I am sending you the minutes of our meeting of February 9, 1973, on the Tax Rebellion Movement. These minutes enumerate action items for the Los Angeles and San Francisco District Directors and for Regional Office officials.

I appreciate your past attention to this serious matter and feel confident that all of us working together can successfully overcome this challenge to our tax system.

Homer O. Croasmun
Homer O. Croasmun
Regional Commissioner

Attachment

APPENDIX G

MINUTES OF FEBRUARY 9, 1973 CONFERENCE ON TAX REBELLION MOVEMENT IN CALIFORNIA

Participants

Mr. Croasmun, Regional Commissioner

Mr. Schwartz, Regional Counsel

Mr. Rowe, Regional Inspector

Mr. Kingman, District Director, San Francisco

Mr. Schmidt, District Director, Los Angeles

Mr. McCart, Acting Assistant Regional Commissioner, Intelligence

Mr. Hansen, Chief, Los Angeles

Mr. Howard, Chief, San Francisco

Mr. Monzon, Chief, Enforcement, Regional Office, BATF

Mr. Vargofcak, Assistant Special Agent-in-Charge, San Francisco

Mr. Dvorak, Assistant Regional Inspector

Mr. Pollock, Regional Protective Programs Manager

Mr. Busalacchi, Regional Public Affairs Officer

Mr. Krause, Regional Coordinator, Tax Rebellion Movement

Mr. Croasmun opened the conference with a review of the history of the Tax Rebellion Movement. He stated we should set up our metes and bounds to achieve our goals; that we do not have unlimited manpower so we must focus

on the total program and concentrate on the leaders of the movement attacking IRS.

Mr. Croasmun pointed out that seven months ago we changed our direction on Tax Rebellion cases from a defensive posture and have now seized the initiative by infiltration of their organization so we now know in advance of their plans before they execute them. This is vital and we must continue to stay aggressive if we are to enforce the revenue laws and to protect the Service from attack by tax rebel militants.

Mr. Croasmun stated that we are not limiting ourselves to the sanctions in the Revenue Code, but are using all the available law enforcement machinery whether it be federal, state or local laws; for example, if a tax rebel leader is violating a state law by carrying a concealed weapon, we should use state enforcement to prosecute him; and if there is a firearms violation, ATF agents should be alerted.

Mr. Howard advised that he had been advised by the Detroit District that since (blank) spoke on the radio in Cleveland, there had been a flood of General Motors employees submitting false forms W-4. Mr. Busalacchi stated he had a report that (blank) had been active in Albuquerque.

Mr. Hansen advised that a (blank) of Ventura County had attempted to file false forms W-4; that he is now leading the Mariposa camp for militants organized by (blank) the (blank).

Mr. Vargofcak said the sheriff of Mariposa County had been checking on the activities of (blank) since May 1972, when the (blank) bought the Mariposa property from (blank); that (blank) is a close personal friend of (blank) that (blank) has a state criminal record; that he has three

or four firearms; and that the Bureau of Alcohol, Tobacco & Firearms has a case on (blank).

Mr. Schmidt pointed out that there are varying degrees of militancy in the various tax rebellion groups; that in the Los Angeles District, Taxpayers Anonymous in Orange County, led by (blank) and (blank) is the most militant; and that we should keep this in mind in deciding our targets.

Mr. Monzon gave a summary of laws enforced by the Bureau of Alcohol, Tobacco & Firearms which could be used on tax rebel cases. He pointed out it is not a federal violation to carry a gun unless the person has a felony record; that an automatic pistol is not an "automatic" gun under the definitions of BATF unless one pull of the trigger will discharge multiple shots; that explosives are a federal violation; and, likewise, "silencers" are a violation. He said he wanted more information about a report that tax rebels are able to buy silencers in Phoenix, as this would be a clear violation.

Mr. Howard advised he has been conferring with state tax officials who are anxious to cooperate with IRS in the attack on tax rebels who also do not pay state taxes; often the state can move quickly to close up a tax rebel's business or revoke his license; that we should see that the state uses its enforcement machinery on those cases which are not our targets.

Mr. Croasmun reported on his discussions with Assistant U.S. Attorney Couris and Judge Crocker, Fresno, and of their interest in enforcement of the law in tax rebel cases. Mr. Hansen commented on the problem of federal judges appearing to be anti-IRS based on a belief that IRS is "highhanded." Mr. Howard reported on a change of attitude in federal judges in San Francisco after he met with

a number of them and discussed the gravity of the Tax Rebellion Movement and the importance of giving prison sentences as deterrents.

There was a general discussion of the importance of meeting with U.S. Attorneys and federal judges to acquaint them with the full picture of the tax rebellion movement. Mr. Croasmun pointed out that after his meeting with Mr. Couris and Judge Crocker, they requested background information on the Movement which was furnished them.

Mr. Kingman suggested the possibility of requesting religious leaders to warn their following against participation in the movement, pointing to the beneficial effects of Mormon Church President Lee's message.

Mr. Howard advised that after his discussion with the federal judges they said they had not full background information on some of the defendants to whom they had given light sentences.

Mr. Schwartz suggested that the Porth-type cases not prosecuted should at least be considered for fraud penalties or other civil penalties.

Mr. Schwartz also advised the district directors that they should instruct employers who receive false forms W-4 or W-4E which they know to be false through admission of employee or knowledge of previous employment that the employer should disregard the false exemption certificate and withhold on the basis of zero exemptions or on the basis of a former correct form W-4.

There was a general discussion on the problem of detecting false W-4 or W-4E cases where the taxpayer does not so advise the government or the employer does not do so; and, particularly so where the taxpayer completes his action by not filing any form of 1040 at year end, but becomes an "IRS dropout." With the present limited matching at

the Service Centers of the filing index with prior years' returns, or employers' copies of W-2's with filing indexes, such cases will probably never be detected. Suggestions were made that we use all available means to reach employers to advise them of their responsibility to advise IRS when they receive a suspected false form W-4 or W-4E. Also, we should use our liaison contacts with the Tax Executive Institute to get the message to them of their responsibility in such cases and of advising employer-clients. Also, we should use trade journals to reach employers with this message. Also, we should use Circular E for this purpose.

Mr. Krause pointed out the importance of close planning on common targets by the tax rebellion project supervisors of the Los Angeles and San Francisco districts with planning meetings as needed.

Action Items for District Directors:

1. Maintain the initiative in the attack on the tax rebels.

2. Know their plans before they arrive at our door to execute them.

3. Identify the leaders of the Movement and concentrate on them.

4. Have a plan of action in coordination with the Region rather than hit and miss defensive reactions.

5. Continue and step up the infiltration in-depth of the Movement.

6. Use all available federal, state and local laws.

7. Use civil penalties on Porth-type cases.

8. Wage a campaign to educate U.S. Attorneys and federal judges with the importance of prison sentences on cases.

9. District Directors to continue to follow up cases of admitted or known false W-4's or W-4E's to advise employers of responsibilities in such cases and follow up to see that proper 1040's are filed at the filing season.

10. Use State taxing agencies willing to cooperate on enforcement of laws on tax rebels.

11. Los Angeles and San Francisco project supervisors to hold periodic planning meetings on common targets.

Action Items for Region:

1. Use Tax Executive Institute liaison to inform tax consultants and their client-employers of their duties on suspected false exemption cases.

2. Consider requesting legislation or an IRS published ruling to require employers to file with service centers a copy of amended W-4 or W-4E forms.

3. Use Circular E, The Employer's Tax Guide on Withholding, to inform employers of responsibilities on suspected false exemption cases.

4. Use trade journals to reach employers for same purpose.